

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ARLANDUS M. NOLEN,

Defendant-Appellant.

UNPUBLISHED

October 24, 2006

No. 266300

Gogebic Circuit Court

LC No. 04-000271-FH

Before: Whitbeck, C.J., and Murphy and Smolenski, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial conviction of possession of a weapon by a prisoner, MCL 800.283(4). He was sentenced as a second habitual offender, MCL 769.10, to 36 to 90 months' imprisonment. We affirm.

Defendant first argues that he is entitled to resentencing because the trial court failed to recognize that it had sentencing discretion with respect to the habitual offender enhancement. We disagree. When imposing a maximum sentence that is discretionary because of the defendant's status as a repeat felony offender, the sentencing court is not required to state that it understands that it has sentencing discretion and is utilizing that discretion. *People v Knapp*, 244 Mich App 361, 388-389; 624 NW2d 227 (2001). On the contrary, "absent clear evidence that the sentencing court incorrectly believed that it lacked discretion, the presumption that a trial court knows the law must prevail." *Id.* at 389.

Here, there is no clear evidence that the trial court was unaware of its sentencing discretion. The trial court's simple statements regarding defendant's past felony conviction and its impact on imposing a sentence did not suggest that the court lacked knowledge of its discretion. Rather, the record indicates that the trial court was exercising its discretion and fully intended to sentence defendant to the maximum penalty allowed, not because it believed that it was required to do so, but because of defendant's history involving drugs, weapons, and violent crime. Resentencing is unwarranted.

Next, defendant claims that the district court lacked probable cause to bind him over and reversibly erred by failing to state its grounds for the bindover on the record. A court's decision to bind over a defendant is reviewed for an abuse of discretion. *People v Woods*, 200 Mich App 283, 288, 504 NW2d 24 (1993). In the case at bar, officer Yon's testimony was more than sufficient evidence to establish probable cause and bind defendant over for trial. See *id.* at 287-

288 (circumstantial evidence and reasonable inferences arising therefrom may be sufficient to justify a bindover). Moreover, because sufficient evidence was presented to convict defendant at trial, any errors relative to the preliminary examination were harmless. *People v Libbett*, 251 Mich App 353, 357; 650 NW2d 407 (2002).

Defendant continues by alleging that the lower courts violated the 14-day rule, MCL 766.4, and the 180-day rule, MCL 780.131, by holding defendant's second preliminary examination more than 14 days after defendant's arraignment and by failing to bring defendant to trial within six months. However, defendant previously applied for interlocutory leave to appeal regarding these issues, and the application was denied for "lack of merit in the grounds presented." *People v Nolen*, unpublished order of the Court of Appeals, entered February 28, 2005 (Docket No. 259317). Generally, a ruling on an issue by an appellate court binds the appellate court in a subsequent appeal if the ruling expressed an opinion on the merits. *Grievance Administrator v Lopatin*, 462 Mich 235, 260; 612 NW2d 120 (2000). The unpublished order was a decision on the merits, and we will abide by that ruling. Moreover, even upon independent review, there is no merit to defendant's arguments. See MCL 780.131(2)(a) (exception to 180-day rule for offenses committed by inmate while incarcerated in correctional facility) and MCL 766.7 (good cause for delay with respect to preliminary examination negates violation of 14-day rule).

Defendant also now asserts his constitutional right to a speedy trial. US Const, Am VI; Const 1963, art. 1, § 20. Defendant is entitled to a separate analysis of whether his constitutional right to a speedy trial was violated. *People v Farmer*, 127 Mich App 472, 478; 339 NW2d 218 (1983). Constitutional issues are reviewed de novo. *People v Levandoski*, 237 Mich App 612, 619; 603 NW2d 831 (1999). To determine if a pretrial delay violated a defendant's right to a speedy trial, a four-part balancing test is applied, taking into consideration (1) the length of the delay, (2) the reason for the delay, (3) the defendant's assertion of the right, and (4) prejudice to the defendant. *People v Cain*, 238 Mich App 95, 112; 605 NW2d 28 (1999). The overall record supports a finding that defendant was not denied his right to a speedy trial. Defendant's numerous and meritless motions and other tactics were primarily responsible for delaying the start of his trial. Defendant was even granted a requested adjournment of his trial. While defendant claims to have been prejudiced by these delays, he also benefited from them, as they allowed him to complete his legal maneuvering, as well as to research and investigate his case. The fact that defendant failed to object to any delays occurring after the preliminary examination only strengthens the inference that they existed for his own benefit. Defendant cannot take measures to lengthen and prolong the trial process, benefit from those measures, and then subsequently complain about the length of the trial process. Reversal is unwarranted.

Defendant next asserts that his constitutional right to due process of law was violated when two pieces of evidence, the gloves used in the incident and police notes taken of the incident, were destroyed before defendant could request their production. "Whether defendant's right to due process was violated is a question of law. This Court reviews questions of law de novo." *People v Walker*, 234 Mich App 299, 302; 593 NW2d 673 (1999).

In *People v Johnson*, 197 Mich App 362, 365; 494 NW2d 873 (1992), this Court stated:

Absent the intentional suppression of evidence or a showing of bad faith, a loss of evidence that occurs before a defense request for its production does not

require reversal. Similarly, the routine destruction of taped police broadcasts, where the purpose is not to destroy evidence for a forthcoming trial, does not mandate reversal. Defendant bears the burden of showing that the evidence was exculpatory or that the police acted in bad faith. [Citations omitted.]

Here, neither the destruction of the gloves nor the loss of the police notes amounts to a showing of bad faith or the intentional suppression of evidence. The record reveals that the gloves were destroyed pursuant to standard Department of Corrections [DOC] policy before defendant was charged in the case. That the DOC acted according to normal or routine practices tends to show that it acted in good faith. Also, when asked at trial if the gloves were large enough to conceal the weapon, officer Yon conceded that they were large enough to conceal it. Thus, defendant found an alternative way to prove his point. The whereabouts of the police notes at issue are not clearly reflected in the record. There is simply no evidence that they were destroyed in bad faith or intentionally suppressed, nor that they even contained exculpatory evidence. Accordingly, defendant has failed to establish that destruction of the notes and gloves violated his right to due process of law.

Defendant next claims that the prosecutor intentionally presented false testimony at the trial. However, the record reveals no evidence that any prosecution witness gave false testimony. Reversal for alleged prosecutorial misconduct is unwarranted.

Defendant's next claim is that he was prejudiced by the jury seeing him shackled during trial, coming in and out of the law library and into the court room, and while entering the elevator. He claims that he was also prejudiced by the shackling of a defense witness while giving testimony. We cannot ascertain from the record whether defendant was shackled in view of the jury; therefore, we have no basis for reversal in this regard. *People v LaBelle*, 231 Mich App 37, 39; 585 NW2d 756 (1998). There is, however, an indication in the record that the witness was shackled, although the reasons for the shackling remain unknown to us. Defendant failed to preserve this issue for appeal, and thus our review is for plain error affecting defendant's substantial rights, i.e., a showing of prejudice. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). Furthermore, even where it is determined that plain error occurred affecting a defendant's substantial rights, this Court must exercise its discretion and only reverse the conviction when the error resulted in the conviction of an actually innocent defendant or when the error seriously affected the fairness, integrity, or public reputation of the judicial proceedings independent of the defendant's innocence. *Id.* On the record before us, defendant fails to establish a plain error affecting his substantial rights and, assuming error, we cannot conclude that the error resulted in the conviction of an actually innocent person or seriously affected the fairness of the judicial proceedings. Moreover, assuming that defendant was shackled and acknowledging that the witness was shackled, the record does reflect that defendant has a violent history and was incarcerated with the DOC,¹ where he was still able to procure a weapon, and that the witness was likewise incarcerated, which would have given the trial court a

¹ At sentencing, defense counsel indicated his belief that defendant was being kept in high security at the prison.

sound basis to keep them in shackles during the trial. See *People v Dixon*, 217 Mich App 400, 404-405; 552 NW2d 663 (1996).

In the next issue, defendant contends that his counsel was ineffective because he failed to help him file pretrial motions, he failed to spend enough time with defendant preparing his case, and he failed to object to defendant and defendant's witness being shackled at trial. Because defendant failed to move for a hearing pursuant to *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973), our review is limited to errors apparent on the record. *Knapp, supra* at 385.

In *People v Carbin*, 463 Mich 590, 599-600; 623 NW2d 884 (2001), our Supreme Court, addressing the basic principles involving a claim of ineffective assistance of counsel, stated:

To justify reversal under either the federal or state constitutions, a convicted defendant must satisfy the two-part test articulated by the United States Supreme Court in *Strickland v Washington*, 466 US 668; 104 S Ct 2052; 80 L Ed 2d 674 (1984). See *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994). "First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not performing as the 'counsel' guaranteed by the Sixth Amendment." *Strickland, supra* at 687. In so doing, the defendant must overcome a strong presumption that counsel's performance constituted sound trial strategy. *Id.* at 690. "Second, the defendant must show that the deficient performance prejudiced the defense." *Id.* at 687. To demonstrate prejudice, the defendant must show the existence of a reasonable probability that, but for counsel's error, the result of the proceeding would have been different. *Id.* at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* Because the defendant bears the burden of demonstrating both deficient performance and prejudice, the defendant necessarily bears the burden of establishing the factual predicate for his claim. See *People v Hoag*, 460 Mich 1, 6; 594 NW2d 57 (1999).

On careful review of each alleged instance of ineffective assistance, and given that our review is limited by errors apparent on the record, we hold that defendant has either failed to show deficient performance or failed to establish prejudice; therefore, reversal is unwarranted.

Finally, defendant argues that the trial court erred by reappointing defendant the same attorney who had previously represented him in this case. "An indigent defendant is entitled to counsel. He is not entitled to counsel of his choice nor is he entitled to different counsel whenever and for whatever reason dissatisfaction arises with counsel provided for him." *People v Bradley*, 54 Mich App 89, 95; 220 NW2d 305 (1974). A defendant is entitled to substitution of appointed counsel only upon a showing of good cause and where substitution will not unreasonably disrupt the judicial process. *People v Bauder*, 269 Mich App 174, 193; 712 NW2d 506 (2005). Good cause for substitution exists where a legitimate difference of opinion develops between a defendant and his appointed counsel with regard to a fundamental trial tactic. *Id.*

At a point in the proceedings, defendant requested that he be permitted to represent himself. Defendant later requested that he once again be appointed counsel. Defendant did not indicate any objection to the reappointment of his former counsel. Nevertheless, on appeal, defendant argues that it was error on the part of the trial court to reassign him the same attorney.

Despite defendant's numerous and newfound assertions of disagreements in trial strategy and conflicts of interest with his attorney, the record does not support the existence of any such issues. As a result, defendant has failed to establish that good cause existed to remove his trial attorney and appoint substitute counsel. We have examined all of the appellate issues raised by defendant, and we conclude that there is no basis for reversal.

Affirmed.

/s/ William C. Whitbeck

/s/ William B. Murphy

/s/ Michael R. Smolenski